



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

In the Matter of the Petition of the City of Altoona
Regarding a Discharge Permit for the City
Municipal Separate Storm Sewer System

Case No.: IH-00-05

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The City of Altoona filed an appeal with the Department of Natural Resources on August 31, 1999, contesting the Department's designation of the City of Altoona as requiring a municipal stormwater discharge permit under subchapter 1 of NR 216, Wis. Adm. Code. The Department denied the City's appeal on November 18, 1999.

On December 17, 1999, the Department received a petition for a contested case hearing pursuant to sec. 227.42, Stats., from Attorney William G. Thiel on behalf of the City of Altoona. On December 28, 1999, the Department granted a contested case hearing pursuant to sec. 227.42, Stats., limited to the following issues:

1. Whether the Department appropriately designated the City of Altoona's municipal separate storm sewer system for permitting under NR 216 on the basis that discharges from it are a significant contributor of pollutants to waters of the state, pursuant to sec. 283.33(1)(d), Stats., and sec. NR 216.02(4), Wis. Admin. Code; and
2. Whether the City of Altoona has, as required by sec. NR 216.04(5)(b)3., Wis. Admin. Code, demonstrated why its municipal storm sewer discharges are not a significant contributor of pollutants to waters of the state.

On May 8, 2000, the Division of Hearing and Appeals received a Request for Hearing from the Department.

Pursuant to due notice hearing was held on August 8, 2000, at Eau Claire, Wisconsin, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties requested an opportunity to submit written closing arguments and the last brief was received on September 11, 2000.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Wisconsin Department of Natural Resources, by

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City of Altoona, by

Attorney William G. Thiel
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FINDINGS OF FACT

1. The Department of Natural Resources (the Department) designated the City of Altoona (the City) as a municipality required to apply for a municipal stormwater discharge permit pursuant to NR 216, Wis. Admin. Code on June 3, 1999.
2. On August 23, 1999, the City filed a formal appeal for the designation requiring a WPDES permit for stormwater discharge.
3. On August 30, 1999, the Department advised the City that it would consider any information provided by November 8, 1999, as part of its appeal. On November 3, 1999, the City requested that the Department extend the period for submission of data associated with the City's appeal until such time as a substantial rainfall occurs and a second round of monitoring could be completed.
4. On November 18, 1999, the Department concluded that the City has not shown that the City was not a significant contributor of pollutants to the waters of the State.
5. The City appealed the decision of the Department on December 17, 1999.
6. On December 28, 1999, the Department granted in part the request for contested case hearing regarding the City's designation as a municipality requiring a stormwater discharge permit, as described above.
7. Stormwater drainage from the City of Altoona flows into Otter Creek, a navigable water of the State. Otter Creek is tributary to the Eau Claire River, which flows into the Chippewa River. Otter Creek is a meandering stream which is surrounded in part by steep banks and bluffs.

8. The City is quite developed in areas that impact stormwater drainage in the Otter Creek watershed. There are numerous residential, commercial and industrial properties within the City of Altoona. There are also two golf courses, both of which are located directly proximate to Otter Creek. Hillcrest Golf and Country Club is located between the discharge and outfalls #4 and 11. (Ex. 1) The Eau Claire Country Club is located downstream from the Spooner Avenue bridge and outfall #20. (Id.)

9. The City undertook two days of sampling in support of its argument that it is not a significant source of pollutants to the waters of the State. The City retained the environmental consulting firm RMT to undertake a stormwater quality analysis which involved a review of outfalls to Otter Creek within the City limits of the City of Altoona. The analysis also involved the collection of samples at all known outfalls on October 6, 1999 (as a non-precipitation event day) and on November 23, 1999, during a precipitation event. The sampling met protocol established under NR 216, Wis. Admin Code.

10. RMT identified a total of twenty-seven separate outfalls within the City limits of the City of Altoona. Thirteen of the outfalls sampled discharged stormwater from subdivisions, highways or city streets; seven were directly associated with stormwater drainage from the Hillcrest Country Club Golf Course; seven are directly associated with stormwater drainage from the Eau Claire Country Club Golf Course and two surface flow outfalls are located in the western boundary of the Hillcrest Country Club course. The City has no control over discharges from seventeen of the twenty-seven outfalls. (Ex. 1)

11. The RMT analysis resulted in several recommendations made by the project manager, Mr. John Oswald and the project environmental scientist, Mr. Dean Epping. RMT advised the City that there was an elevated total suspended solids (TSS) discharge at outfall #6 in the City of Altoona. The precipitation event discharge for TSS was significantly higher than background values. (Ex. 1, Table 4) The discharge was measured as milligrams per liter and indicated a value of 310 milligrams per liter at outfall #6. Further, the RMT team recommended that the stream bank on the western side of Otter Creek was eroding from the elevated outfall #15 discharge. RMT recommended that the City redesign this discharge outfall to prevent further erosion from occurring. Similarly, the City was also advised by RMT that it should undertake efforts to reduce erosion near outfall #11 located adjacent to a privately owned golf course.

However, RMT concluded that its study did not support the designation of the City to be a significant contributor to pollutants to the waters of the State. (Ex. 1) Mr. Dean Epping of RMT agreed that Otter Creek had some elevated readings for total suspended solids. However, Epping opined that stream bank erosion was a significant source of sediment, in addition to outfall numbers 6 and 15.

12. The Department presented the testimony of DNR Engineer Steve Thon. Thon indicated that the RMT study did not provide a sufficient amount of data to make a determination as to whether or not the City stormwater discharge constituted a significant source of pollutants

to the waters of the State. (Thon) The RMT study sampled only two days, one precipitation event day and one non-precipitation event day. Thon opined that it was impossible to determine if the City was a significant source of pollutants based on this limited data set. Epping admitted that the RMT report did not sufficiently account for variability of storm events and seasonal variability. Epping stated that TSS concentrations would likely be higher in the early spring, after build up over the winter.

Thon opined that there was substantial support for the designation of the City as a municipality requiring a WPDES permit for its stormwater discharges. Thon presented photographs of extremely turbid, muddy water roaring into Otter Creek at outfall #15. (Ex. 14) While the City argues that outfall #15 will be reconfigured in conjunction with a state highway project, there is not sufficient basis in the record to make a finding that outfall #15 is not a significant contributor to pollutants entering Otter Creek through the existing elevated discharge pipe.

Further, RMT's own study indicated that there was room for substantial improvement on the City's management of its stormwater discharge, particularly of TSS. There is no doubt that outfall #6 which serves a large subdivision within the City of Altoona is a significant source of total suspended solids entering Otter Creek. The RMT report indicated and Epping opined that best management practices and sampling, both features of a stormwater discharge permit, should be undertaken at outfall #6.

13. In addition to TSS, the RMT report indicated that the City of Altoona stormwater likely represents a significant source of pollutants for other parameters, including fecal coliform bacteria. The majority of samples exceeded recreational use surface water standards of 200 co/100 mil, and outfalls #14 and 15 did so by a wide margin. (Ex. 1, Table 4)

14. As the City agrees, there is an inter-connectiveness between the City of Altoona's stormwater discharge and the discharge of the City of Eau Claire. The City of Eau Claire is a stormwater discharge permit holder. The TAFT interchange which RMT identified as outfall #14 clearly is owned by the City of Eau Claire and received stormwater from the City of Altoona. The Taft interchange sewer drains a large area of Eau Claire, and western portions of Altoona. Eau Claire and Altoona are directly proximate municipalities. Mr. Ken Tully, City of Altoona Director of Public Works, testified that some fifteen percent of the total catchment of the City drained into this connected sewer. Further, pollutants in storm water discharged into Otter Creek and the Eau Claire River flow into the Chippewa River, which received a significant flow of stormwater from the City of Eau Claire.

15. Given the record as a whole, and considering the factors set forth in NR 216.02(4)(a), it is appropriate that the City of Altoona be designated as a municipality requiring a stormwater discharge permit. The City of Altoona has not carried its burden of proof in demonstrating that it is not a significant source of pollutants to the waters of the State.

16. Total suspended solids and fecal coliform bacteria are "pollutants" within the meaning of sec. 283.01(13), Stats., and NR 216.002(2), Wis. Admin. Code.

DISCUSSION

The City of Altoona (the City) disputes its designation as a municipality requiring a municipal stormwater discharge permit. While the City has overall done a good job of managing its stormwater discharge, the City has not carried its burden of proving that its stormwater is not a significant source of pollutants to the waters of the State.

Several key factors support the Department's determination. First, stormwater from the City of Altoona is connected at the Taft interchange with the City of Eau Claire, which has a stormwater discharge permit. It makes sense for interconnected municipalities to have the same requirements, and sec. NR 216.02(4)(a)(1), Wis. Admin. Code, reflects this fact. Physical interconnections between Eau Claire and Altoona strongly support a similar regulatory approach for each municipality, and a stormwater discharge permit for Altoona. A significant portion of the City of Altoona drains into the Taft interchange. It would be unfair to the City of Eau Claire to allow a lesser regulatory approach to the Altoona portion than the Eau Claire portion of this discharge.

Secondly, even the City's own consultants, relying on relatively little data, acknowledge that outfall #6, near a large residential subdivision, was a source of pollutants (TSS) to the waters of Wisconsin. (Epping) Mr. Epping opined that this outfall needed improved management practices and further sampling, both features of a stormwater discharge permit. Nonetheless, Mr. Epping opined that this outfall was not a "significant" source of pollutants. However, Mr. Thon of the DNR disputed this conclusion, and raised serious concern over both outfall #6 and outfall #15 as being significant sources of TSS to the waters of the State.

Mr. Thon has the better of the argument, for a number of reasons. First, the City has the burden of proof in this matter. Secondly, the data set provided by RMT does not adequately reflect seasonal or individual variability in storm events. Nor is one storm event sufficient to carry the City's burden on this point in this case of objective concerns about TSS levels at both outfall #6 and #15. Finally, TSS was not the only pollutant of concern in the RMT data.

The Department's designation of the City as requiring a stormwater discharge permit was supported by a clear preponderance of the evidence.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority under secs. 227.43(1)(b) and 283.33(1)(d), Stats., to issue Findings of Fact and issue necessary orders relating to designations of municipalities as requiring a stormwater discharge permit..

2. Section 283.33(1)(d), Stats., sets forth requirements for a stormwater discharge permit if the Department of Natural Resources determines the discharge either contributes to a violation of a water quality standard or is a significant contributor of pollutants to the waters of the State. The DNR stipulated that there were no violations of water quality standards. The City of Altoona has not shown that it is not a significant contributor of pollutants to the waters of the State.

3. Section NR 216.02(4)(a), Wis. Admin. Code, sets forth factors to be considered in making a determination as to the need of a municipality for a separate stormwater discharge permit. The Department and Division of Hearings and Appeals shall consider the following factors when making a designation:

- a. Physical interconnections between your municipal separate storm sewers of a permitted municipality and a designated municipality.*
- b. Location of the discharge from a designated municipality relative to the permitted municipal storm sewer system.*
- c. The quantity and nature of pollutants discharged to the waters of the State.*
- d. The nature of receiving water.*
- e. Protection of the watershed or basin drainage area receiving the municipal discharge.*
- f. Population of the municipality.*
- g. Other relevant factors.*

4. Considering the above factors the Department did not error in designating the City of Altoona as a municipality requiring a stormwater discharge permit. There is no question that the City of Altoona has interconnections with the City of Eau Claire, a permitted municipality within the meaning of sec. NR 216.02(4)(a)1, Wis. Admin. Code. Altoona and Eau Claire are directly proximate municipalities. Further, the City's own data set, while limited, suggests that the City of Altoona is a significant source of TSS and fecal coliform bacteria into the waters of the State.

5. The City of Altoona has not demonstrated why they are not a significant contributor of pollutants to the waters of the State within the meaning of sec. NR 216.04(5)(b)(3).

ORDER

The designation of the City of Altoona as a municipality requiring a WDPES stormwater discharge permit is upheld.

Dated at Madison, Wisconsin on October 5, 2000.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.